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IN THE

# SUPREME COURT OF THE UNITED STATES

No. 1022

OCTOBER, 1964, TERM

**THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, ET AL., Petitioners,**

**vs.**

**DEBORAH A. NORTHCROSS, ET AL., Respondents.**

## PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

**TO THE HONORABLE, THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:**

Come the petitioners, the Board of Education of the Memphis City Schools and the members and superintendent of said Board, and file this, their petition for a Writ of Certiorari, and in support of said petition, respectfully show to the Court:

### I. JURISDICTIONAL STATEMENT

A. This petition seeks a review of a decision of the United States Court of Appeals for the Sixth Circuit, styled "Northcross, et al., v. Board of Education of the City of Memphis, et al.", being Cause Number 14,642 in said Court. The opinion of the Court of Appeals is appended to this petition but is not yet officially reported. A petition to rehear was filed in said cause and there is likewise appended the opinion of the Court of Appeals on that petition.

B. The original opinion of the Court of Appeals was filed in the cause and judgment rendered in accordance therewith on March 23, 1962, and the Court last took action in the case on May 15, 1962 when a supplemental opinion making an additional finding of fact was filed.

On May 2, 1962, the Court of Appeals entered an order staying its mandate in this cause for thirty (30) days pending the filing of this petition for certiorari. An additional stay of fifteen (15) days was granted by the Court on May 29, 1962.

This suit involves the desegregation of the public school system of the city of Memphis, Tennessee. The respondents invoked the jurisdiction of the United States District Court by virtue of Section 1343(3), Title 28, U.S.C. and Section 1983 of Title 42, U.S.C. This Court may entertain jurisdiction of this petition under Section 1254(1), Title 28, U.S.C.

## II. QUESTION PRESENTED FOR REVIEW

A. Petitioners had long prior to the filing of the suit in this cause made frequent public announcements that they intended to use the Tennessee Pupil Assignment Law as the plan for the desegregation of the Memphis public school system. Petitioners had personally advised the respondents and their local counsel of petitioners' intention in that respect. The District Court approved the Tennessee Pupil Assignment Law as the plan of desegration. *Said law was in fact effectively and successfully used by the parties as the vehicle for effecting the desegregation of the Memphis Public School System for the school year commencing September* 1, 1961. (Affidavit of William D. Galbreath, appendix, page 45)

The first question presented for review may thus be stated:

**Under the facts of the case at bar, may the Tennessee Pupil Assignment Law, administered constitutionally and in good faith, serve as a method or plan for the desegregation of the Memphis public school system?**

B. Paragraph VIII of respondents' complaint filed in the District Court concedes that no effort had been made "to exhaust the administrative remedy provided by the Tennessee Pupil Assignment Law." (Appendix, Page 5) The record shows, however, that the first time the administrative remedy afforded by that law was initiated by respondents or members of the class represented by them, relief was promptly and effectively afforded them on a racially nondiscriminatory basis.

The second question presented may be stated thusly:

**Are respondents obligated to exhaust the administrative remedy afforded them under the Tennessee Pupil Assignment Law before seeking judicial relief . . . especially where the administrative remedy has already in fact served to accomplish the purpose sought by respondents' complaint?**

## III. THE STATUTES INVOLVED

Respondents complaint was filed pursuant to the provisions of Section 1343(3) of Title 28, U.S.C., and Section 1983 of Title 42, U.S.C. These sections provide:

**"1343. Civil rights and elective franchise.**

The district courts shall have original jurisdiction

of any civil action authorized by law to be commenced by any person:

. . . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

1983. **Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In a consideration of this petition the Court will be concerned with the Tennessee Pupil Assignment Law. That law appears as Sections 49-1741 through 49-1763 of the Tennessee Code Annotated and may be found at page 64 of the Cumulative Supplement to Volume 9 of that Code. The law is quite lengthy and is quoted in its entirety beginning at page 298a of the Certified Record on Petition for Writ of Certiorari filed in this cause. It is also quoted in the appendix to this petition, beginning at page 76.

## IV. STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks to have the Supreme Court review a decision of the United States Court of Appeals for the Sixth Circuit.

### A. The Pleadings and Proceedings in the District Court.

Respondents filed their complaint seeking an order enjoining the petitioners from operating a compulsory biracial school system or, in the alternative, for an order directing petitioners to submit a plan for the re-organization of the schools on a unitary non-racial basis. Respondents' complaint alleged:

> "... that the defendants maintain and operate a compulsory biracial school system in the City of Memphis, in which certain schools are designated for Negro students only and staffed by Negro personnel, and certain other schools are designated for white students only and staffed by white personnel. It is further alleged that this is separate geographical zoning for the Negro and white schools and that these zones in some instances overlap so that both Negro and white students are in the same zone. The plaintiffs also allege that they have not exhausted their remedies under the Tennessee Pupil Assignment Law for the reason that it does not provide an adequate remedy for the relief they seek." (Opinion of Court of Appeals, Appendix P. 50)

In their answer to the complaint petitioners denied that they operated a compulsory bi-racial school system. They conceded that there was at that time no racial integration of their schools for the reason that there had never been

an application by a member of one race to attend a school theretofore attended by members of another race; that it would be impractical and impossible for the Board of Education arbitrarily to pick here and there certain school children and assign them to another school, that is to say, for the Board of Education to coercively assign a child of one race against his will to a school attended by members of another race would constitute nothing less than compulsory integration; and that on February 8, 1960, prior to the filing of suit respondents had been advised that application to enroll their children in any school of their choice would be considered by the Board of Education in good faith and in accordance with law. (Appendix P. 14)

The petitioners also answered that the Tennessee Pupil Assignment Law afforded both respondents and petitioners a plan for the desegregation of the school system and that the respondents were obligated to initiate and pursue the administrative remedy afforded by that Assignment Law before seeking judicial relief.

Judge Cecil's opinion in the Court of Appeals well states the decision of the District Court:

> "A trial was had in the District Court upon the issues presented by the pleadings, after which the District Judge made findings of fact and conclusions of law and entered judgment on May 2, 1961.
>
> The trail judge found as facts, that the defendants do not operate a compulsory biracial school system or maintain a dual schedule or pattern of school zone lines based upon race or color; that the school zone maps introduced in evidence have no significance as evidence

of a biracial school system; that the Tennessee Pupil Assignment Law furnishes the plaintiffs an effective and adequate remedy for integration and as effective a plan for compliance with the decisions of the Supreme Court of the United States as the Court could devise; that the defendants' intention to effect integration of the school system under the Pupil Assignment Act has been open and generally known to the public and that the plaintiffs and their attorneys were so advised at a public meeting of the Board of Education on February 6, 1960; that the Board has evidenced all good faith to the public and to the court of its intention to comply with the decision of the Supreme Court.

By judgment entry the court sustained the plaintiffs' prayer for alternative relief by approving the Tennessee Pupil Assignment Law as a plan for desegregation and denied further relief to the plaintiffs for the reason that the defendants did not operate a biracial school system and the plaintiffs had not exhausted their administrative remedies under the Assignment Law." (Appendix P. 51)

### B. The Desegregation of the Schools Under the Plan.

Respondents appealed the District Court's decision to the Court of Appeals. In September, 1961, several months before the argument of the cause in that Court, some of the members of the class upon whose behalf respondents had filed suit applied for admission and were enrolled in schools that had theretofore been attended solely by members of another race. In considering this event the Court should be advised that with one possible exception this was the first time that such an application had been made. That is to say this

was the first time that the Board of Education had been given the opportunity of desegregating its school system under the plan afforded by the Tennessee Pupil Assignment Law or any other plan or law.

Thirty-six (36) Negro first grade pupils made application to transfer to schools that had previously been attended only by white students; two (2) Negro first grade students made application to attend schools theretofore attended by Negro pupils; and four (4) white first grade pupils made application to transfer to other white schools. Only one racial transfer was involved in the numerous transfer applications in the remaining grades of the school system.

The processing of all of these transfer applications was begun under the Tennessee Pupil Assignment Law, and with respect to the thirty-six so-called "racial applications" thirteen (13) children were assigned to attend four (4) previously white schools. We shall not belabor the matter further except to respectfully refer the Court to the affidavit of Mr. W. D. Galbreath, President of the Board of Education, which appears on page 45 of the appendix to this petition. Suffice it to say that local counsel for respondents in this cause who devoted much time, effort and planning to the events, described the Assignment Law and the application of that law by the parties in the case at bar as the most effective "plan of desegregation" that they had ever experienced and their experience in the broad spectrum of Civil Rights litigation is rather substantial.

The desegregation of the Memphis schools should be considered in the light of petitioners' announcements made prior to the filing of this suit, as to the manner in which they desired to effect the transition. The Board's attitude

appears in the Findings and Conclusions of the District Court and it was there stated:

> "VIII. The defendants' intention to effect the integration of their school system under the Pupil Assignment Act has not been a secret but has been generally known to the public, including the plaintiffs in this case for quite some time; that the operation of the school system under the law has been made known by the Board of Education to the members of its staff and the principals of its schools; and that at a public meeting of the Board of Education held on February 6, 1960, each of the plaintiffs and their counsel were advised in clear and unequivocal terms that applications by its Negro patrons for the assignment or transfer of a Negro child to a school heretofore attended solely by white children would be duly considered and acted upon by the Board of Education under the Pupil Assignment Law without regard to the race or color of the applicant.
>
> IX. That the Board of Education at said meeting of February 6, 1960, and on other public occasions, as well as in the sworn testimony of the members of said Board appearing in Court, has evidenced all good faith to this Court of its intention to comply with the decision of the United States Supreme Court and in all good faith to consider applications for transfer without regard to race. The Court finds, therefore, that plaintiffs' fears that the law will be administered adversely to them are totally unfounded. The attitude of the plaintiffs toward the Pupil Assignment Law is based, not upon experience or upon what is shown to have occurred, but rather

upon what plaintiffs seem to fear will occur. Such attitude is totally unprincipled." (Appendix, Page 34)

## V. ARGUMENT

### A. Under the facts of the case at bar, may the Tennessee Pupil Assignment Law, administered constitutionally and in good faith, serve as a method or plan for the desegregation of the Memphis public school system?

The answer to this question necessarily involves an analysis and perhaps an elucidation of the decision in **Shuttlesworth v. Board of Education**, 162 F. Supp. 372, affirmed 358 U. S. 101, 3 Law Ed. (2) 145, 79 S. Ct. 221. The Shuttlesworth decision is important for two reasons. First, the District Court discussed in great detail the operation of assignment or placement laws. The Court noted that such laws had been successfully used in other jurisdictions to effect school desegregation. And it was held that these laws furnish "the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to race or color". The factual situation in the case at bar, the successful desegregation of the Memphis schools under the assignment law, furnishes only one other example of the effective use of such laws as a plan of desegregation.

Secondly, the Shuttlesworth case is important for the reason that it is the only instance where this Court has had before it for consideration a state assignment law. In all other cases involving assignment laws the Court has denied certiorari.

This Court's opinion in Shuttlesworth was very short and we quote that opinion in full:

> *"The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision.* 162 *F. Supp.* 372, 384."

## 1. The District Court's Decision in Shuttlesworth.

Since the affirmance by this Court was upon limited grounds it is necessary to consider precisely the holding of the District Court. That ruling appears at page 384 of 162 F. Supp.:

> *"All that has been said in this present opinion must be limited to the constitutionality of the law upon its face. The School Placement Law furnished the legal machinery for an orderly administration of the public schools in a constitutional manner in the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered.* If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State."

Quoting further from the District Court, we find this statement:

> "It is possible for the Act to be applied so as to admit qualified Negro pupils to non-segregated schools. Upon oral argument counsel for both sides expressed their understanding that the North Carolina Pupil En-

rollment Act was actually being so applied. We cannot say, in advance of its application, that the Alabama Law will not be properly and constitutionally administered." (162 F. Supp. 381).

In considering this statement we again respectfully suggest that in Memphis the assignment law has been applied to desegregate the schools. Such application produced the best or most effective "plan of desegregation" that respondents' counsel had ever experienced.

Finally, in holding that a placement or assignment law furnishes the vehicle for "good faith implementation of the governing constitutional principles" in school cases, the District Court in the Shuttlesworth case said:

> "... The legal situation in Alabama is more analogous to that in North Carolina, where the Pupil Enrollment Act was ruled to be not unconstitutional on its face in an opinion by the late great Chief Judge Parker, from which we quote:
>
> 'Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown v. Board of Education, 349 U. S. 294, 299, 75 S. Ct. 753, 756, 99 L. Ed. 1083:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Carson v. Warlick, 4th Cir. 1956, 238 F. (2d) 724, 728."

The very heart of Shuttlesworth is that school placement laws furnish the constitutional legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color.

## 2. The Court of Appeals Did Not Cite Shuttlesworth

Shuttlesworth presents the only instance in which this Court has commented upon or considered pupil assignment laws. Petitioners' position in the Court of Appeals, both in Brief and in oral argument was basically grounded upon Shuttlesworth. The District Court relied on Shuttlesworth in making its decision. One would conclude that these factors would prompt the Court of Appeals to comment on that case and rule that the case has no application or can be distinguished from the case at bar. Neither the original opinion of the Court of Appeals nor the opinion on the petition to rehear contains a single reference to Shuttlesworth.

That decision either has a role in the field of school desegregation or it is a nullity. If it has a role, then the Court of Appeals is obligated to recognize that role and give it effect. If the decision is to be nullified, then this Court should do so. Whether the holding in Shuttlesworth is to be

followed or nullified, the decision of this Court in that case should not be ignored.

It is petitioners' position that Shuttlesworth approves an assignment law as a plan of desegregation in those situations, as in the case at bar, where the school system has applied such law in good faith and desegregated its schools. Numerous school systems have used an assignment or placement law as their plan or method of effectuating a transition to a racially non discriminatory school system. Those systems and petitioners are entitled to a construction of Shuttlesworth by this Court as to the validity of their plan.

### 3. A Conflict with the Eighth Circuit.

**Dove v. Parham** (1959) 271 F. (2d) 132, C. A.8, involved the desegregation of the schools at Dollarway, Arkansas. A detailed history of that litigation appears in an introductory note in 5 Race Relations Law Reporter, Volume 1, at page 43. The District Court had upheld the constitutionality of the Arkansas Pupil Placement Law and had ordered the immediate admission of three Negro students.

The Eighth Circuit Court of Appeals affirmed the District Court on the constitutional issue but reversed that part of the decision directing the admission of three students on the ground that the students had not exhausted the administrative remedy afforded them by the placement law. In discussing the role of assignment or placement laws, Judge Johnsen stated:

> "In this field of constitutional paramountcy, a placement or assignment statute is entitled to be accorded recognition only as an implement or adjunctive element on the part of a state for effecting an orderly

solution to its desegregation difficulties, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the Brown cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result.

But there is no need here to extend further these generalized observations. Reverting to the facial constitutionality of the Placement Act, it follows that the plaintiffs are without any general public school right under Arkansas law to seek admission to a particular school, except on the basis of and in accordance with the provisions of that Act. While their federal constitutional rights have been previously violated in that they have been required to attend a school segregated under administrative authority, the Placement Act provides a means for them now to seek admission to the school which they think they are otherwise entitled to attend and, insofar as the provisions of the Act are concerned, have their right to do so determined without regard to their race or color."

It is respectfully submitted, therefore, that the decision of the Court of Appeals in the instant case gave no consideration or effect to this Court's decision in Shuttlesworth and that the decision conflicts with a decision of the Eighth Circuit.

4. The Proven Effectiveness *of the Plan.*

The District Court signed the judgment in the case at bar on May 2, 1961. In his earlier opinion from the bench the Court urged that the parties try the plan afforded by

the assignment law. (Appendix, Page 29). The plan was tried on August 28, 1961, the first school registration following the entry of the judgment, and four schools were desegregated without incident or turmoil. We had no mob violence nor dynamited schools.

This Court, perhaps better than any other appellate court in the land, recognizes the emotionalism that is generated in this field. No single aspect of human relations is as susceptible to discussion and controversy or presents the opportunity for demonstrations of good will and ill will as is the area in which this case falls. Each community has a different attitude toward school desegregation. Of all communities that have thus far met this problem, Memphis, because of its geographical location and evenly distributed racial balance, is perhaps the one that would be looked upon to generate the greatest amount of unrest and controversy.

To the everlasting credit of the community the exact reverse resulted. Controversy there was, but that controversy was almost completely erased by a deeper spirit of good faith, respect for law and order, and obedience to the decisions of the federal courts.

Immediately one looks for a reason for this accomplishment and, of course, there is no single reason. It might be said that there are as many reasons as there are people in the community. It might better be said that the cooperation which petitioners received from every local public official, from all of the patrons of the school system, both white and Negro, and from every form of news media was the reason.

This Court has said in the second Brown case:

"Full implementation of these constitutional princi-

ples may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. *Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.*"

And the case at bar proves the wisdom of that pronouncement. The District Judge's complete familiarity with local attitudes and conditions, his knowledge of the people residing within his district and their respect for him lead to the successful transition to a desegregated school system.

We have heretofore referred to the statements of respondents' local counsel concerning the effectiveness of the Tennessee Pupil Assignment Law as Memphis' plan of desegregation. The plan was not only satisfactory to respondents' counsel, but it was satisfactory to the great bulk of the population. In fact, it might best be described as a community plan with almost every element in the community working for its success. That success has prompted at least one city, Jackson, Tennessee, to desegregate its school system without litigation and other school officials are investigating the method which Memphis used.

We recognize that this Court is, perhaps, overburdened with petitions seeking the Court's review of litigants' rights. In view of this, the Board of Education seriously considered the advisability of further burdening the Court with the

petition. It was concluded that the welfare of the community, the splendid results achieved under the plan, and the absence of turmoil and strife in this transition merited the filing of this petition with the hope of preserving a plan that met with such wide acceptance. Petitioners sincerely feel that the plan of desegregation approved by the District Court and put into operation by the parties themselves has met with substantial success, has avoided an unfavorable public spotlight for our city, state and nation, and of at least equal importance, this plan has protected the constitutional rights of the parties.

It is impossible for one to ignore realities. We have experienced this plan and it has proved to be successful. We know that it has been accepted as a workable plan by every element of the community. Certainly no plan will endure forever and there will be revisions and modifications as our experience grows, but when desegregation in Memphis is accomplished without strife and vindictiveness under the plan of the assignment law, we feel that we are entitled to use that plan for a few more years. If further experience shows that modification, revision or acceleration of the plan is necessary, the doors of the Court are always open.

We most respectfully urge, therefore, that this Court entertain this petition for a writ of certiorari; that the Court clarify or explain its decision in Shuttlesworth; that the Court approve the plan of desegregation provided by the assignment law as that plan was adopted and used in the Memphis school system; and that the decision of the Court of Appeals be reversed.

**B. Are respondents obligated to exhaust the administrative remedy afforded them under the Tennessee Pupil Assignment Law before seeking judicial relief . . . especially where the administrative remedy has already in fact served to accomplish the purpose sought by respondents' complaint?**

The pleadings in the District Court which are quoted in full in the appendix fix this issue. Paragraph VIII of respondents' complaint acknowledges that the administrative remedy afforded by the Tennessee Pupil Assignment Law has not been exhausted. Paragraph VIII of petitioners' answer goes further and points out that the administrative remedy has not been initiated.

The law with respect to this question has been before the several Courts of Appeal on frequent occasions and the decisions of these Courts are in direct conflict. Five cases from the Fourth Circuit and one case from the Eighth Circuit answer the question in the affirmative, while two cases from the Fifth Circuit and one case from the Sixth Circuit, that being the case at bar, answer the question in the negative. It is suggested that this uncertainty and confusion should be removed in this important field.

**1. The Rule Stated and Applied.**

The general rule of law requiring the exhaustion of administrative remedies before seeking judicial relief is so well established that it would unnecessarily lengthen this petition to give its history. We shall limit our discussion to those cases dealing in the field of school segregation. The first of these cases is **Carson v. Board of Education** (1955) 227 F. (2) 789, C. A. 4. In the Carson case the North Carolina legislature enacted a Pupil Placement Law after the

trial of the case in the District Court and before the decision in the Court of Appeals. In commenting on the effect of such legislation, Judges Parker, Soper and Dobie in a *per curiam* opinion held:

> "In further consideration of the case, however, the District Judge should give consideration not merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel agrieved with respect to their enrollment in the public schools of the state. The Act of March 30, 1955, entitled "An Act to Provide for the Enrollment of Pupils in Public Schools", being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. Myers v. Bethlehem Corp. 303 U.S. 41, 51; Natural Gas Co. v. Slattery, 302 U.S. 300, 310-311; Hageman Farms Corp. v. Baldwin 293 U.S. 163, 172; United States v. Illinois Central R. Co. 291 U.S. 457,

463, Peterson v. Bryan 290 U.S. 570; 575; Porter v. Investor's Syndicate 286 U.S. 461; Matthews v. Rogers 284 U.S. 521, 525-526; Prewitt v. A.C.L.R. Co. 211 U.S. 210.

*This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the State law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary.* As said by Mr. Justice Stone in Matthews v. Rogers, supra, (284 U.S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

(a) *The Rule Applied by the Fourth Circuit.*

**Carson v. Board of Education** was again before the Fourth Circuit Court of Appeals in this suit styled **Carson**

**v. Warlick** (1956) 238 F. (2d) 724, cert. denied, 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. (2d) 644. That suit sought a Writ of Mandamus requiring the District Judge to vacate his order staying further proceedings in the case until the plaintiffs had exhausted the administrative remedies afforded by the Placement Act. The applicants for the writ contended that the Pupil Placement Law was unconstitutional and that the trial should proceed in the court below "as though the pupil placement act had never been enacted".

The Court of Appeals denied the writ of mandamus and required that the administrative remedy afforded by the State law should be exhausted. After discussing the facial constitutionality of the assignment law, Judge Parker stated:

> Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown et al v. Board of Education et al, 349 U. S. 294, 299:
>
> > School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith

implementation of the governing constitutional principles."

It is argued that the statute does not provide an adequate administrative remedy because it is said that it provides for appeals to the Superior and Supreme Courts of the State and that these will consume so much time that the proceedings for admission to a school term will become moot before they can be completed. It is, clear, however, that the appeals to the courts which the statute provides are judicial, not administrative remedies and that, after administrative remedies before the school boards have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in the federal courts without pursuing state court remedies. Lane v. Wilson, 307 U.S. 268, 274. Furthermore, if administrative remedies before a school board have been exhausted, relief may be sought in the federal courts on the basis laid therefor by application to the board, notwithstanding time that may have elapsed while such application was pending. Applicants here are not entitled to relief because of failure to exhaust what are unquestionably administrative remedies before the Board.

There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the grounds of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. Henderson v. United States, 339 U.S. 816, 824. It is the state school authorities who must pass in the first instance on their right to be admitted to any particular school and the

> Supreme Court of North Carolina has ruled that in the performance of this duty the school board must pass upon individual applications made individually to the board. The federal courts should not condone dilatory tactics or evasion on the part of state officials in according to citizens of the United States their rights under the Constitution, whether with respect to school attendance or any other matter; but it is for the state to prescribe the administrative procedure to be followed as long as this does not violate constitutional requirements, and we see no such violation in the procedure here required. We are dealing here, of course, with the administrative procedure of the state and not with the right of persons who have exhausted administrative remedies to maintain class actions in the federal courts in behalf of themselves and others qualified to maintain such actions.

That rule has been reaffirmed in **Covington v. Edwards**, 264 F. (2d) 780, C. A. 4; **Holt v. Raleigh City Board of Education**, 265 F. (2d) 95, cert. denied 361 U. S. 818, 4 L. Ed. (2d) 63, 80 S. Ct. 59; **Hood v. Board of Trustees of Sumter County**, 232 F. (2d) 626, C. A. 4, cert. denied 352 U. S. 870; 1 L. Ed. (2d) 76; 1 L. Ed. (2d) 76; 77 S. Ct. 95 and 286 F. (2d) 236; **McCoy v. Greensborough City Board of Education**, 283 F. (2d) 667.

(b) *The Rule Applied by the Eighth Circuit.*

The Eighth Circuit was presented with this question in **Dove v. Parham**, 271 F. (2d) 132. In the case at bar the contentions made by respondents paralled almost exactly the contentions made by the plaintiffs in the Dove case. Thus, we will quote at length from that case beginning at page 137 of 271 F. (2d):

But there is no need here to extend further these generalized observations. Reverting to the facial constitutionality of the Placement Act, it follows that the plaintiffs are without any general public school right under Arkansas law to seek admission to a particular school, except on the basis of and in accordance with the provisions of that Act. While their federal constitutional rights have been previously violated in that they have been required to attend a school segregated under administrative authority, the Placement Act provides a means for them now to seek admission to the school which they think they are otherwise entitled to attend, and, insofar as the provisions of the Act are concerned, have their right to be so determined without regard to their race or color.

* * * * * *

The plaintiffs here have given no recognition to these administrative provisions and requirements, as they existed under either the 1956 or the 1959 act. All that they did in respect thereto was to make oral request, through their parents, of the Superintendent of Schools, to be permitted to enroll in the school to which they sought admittance. The Superintendent refused this request and told them that they would have to enroll in the school (all Negro) which they had previously attended. The parents filed no written request with the Board for assignment or transfer and for a hearing, and there has never been any Board action under the statute with respect to the situation. The plaintiffs have contended for purposes of this suit, both in the trial court and here, that they were not required to resort to the procedure of the Act for

having the School Board pass upon the question of their right to be transferred and to be enrolled in the school to which they sought admittance, because to do so would have been futile in the situation, and that they thus were entitled to be regarded as having constructively exhausted their administrative remedies under the Act.

* * * * *

It is true that the several schools of the District had been continued to be operated with racial enrollments only. The defendants asserted that this situation had obtained because request in accordance with the statute had never been made to the Board, under the provisions of either the 1956 or the 1959 Act, for reassignment or transfer to another school by anyone. Their position, both in the trial court and here, is summarized by their counsel as follows: 'They (the Board) have continued to operate the schools just as they did before 1954, with one vital exception. They are now bound by law, and sincerely recognized that they are so bound, to make assignments without discrimination because of race.

* * * * *

The lack of any affirmative plan or action to disestablish the segregation status which had unconstitutionally been set up in the District, other than as the Board might be called upon to deal under the provisions of the 1956 or the 1959 Act with some individual application for assignment to another school, would perhaps not measure up to the legal and moral responsibility resting on a Board under the expression

and holding of the Brown cases. But we do not think that it is judicially wise or necessary to impatiently declare that desegregation should on this account be sought to be achieved, without regard to the overall pattern which the District is entitled to create through a constitutional application of the Placement Act, by assuming to excuse some individual student from the requirements of the assignment or placement statute. It must be recognized that the plaintiffs have not been without opportunity, since 1956, to request assignment or transfer on the basis of legislative nonracial scheme, and to have any unconstitutional application of that legislative scheme attempted to be made against them righted by the federal courts.

* * * * *

The statute makes of the Board the equivalent of an administrative tribunal, with the power and duty of engaging in adjudicatory function, including the consideration of the possibility of constitutional violation in relation to its result. No more than in the case of any other administrative agency, or of a court, does it seem to us that there can properly be recognized an anticipatory right to brand such a proceeding before the Board, in its official responsibility for administration of the statute, as being legally futile and so unnecessary. Even the important problem of school desegregation cannot soundly permit of such a departure from established legal concept and fundamental principle.

It is for this reason that we think there is controlling here, and that we adopt, what was said in Carson v. Board of Education, 4 Cir., 227 F (2d) 789, 790: 'Where

the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary.'

In a subsequent case, Carson v. Warlick, 4 Cir., 238 F. (2d) 724, certiorari denied 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. 2d) 664, the court in an opinion by the late Chief Judge John J. Parker, made reiteration of this judicial limitation, holding that the plaintiffs there were not entitled to seek judicial relief, 'for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies have been exhausted.' At page 727 of 238 F. (2d). See also Holt v. Raleigh City Board of Education, 4 Cir., 265 F. (2d) 95, 98." (Op. p. 137, et seq.)

(c). *"Decisions" of the Fifth Circuit.*

The Fifth Circuit has considered this question in two cases. **Gibson v. Board of Public Instruction of Dade County,** 246 F. (2d) 913 and 272 F. (2d) 763, was before the Court on two occasions. The other decision from the Fifth Circuit is **Mannings v. Board of Public Instruction of Hillsborough County,** 277 F. (2d) 370, C. A. 5. The two opinions in the Gibson case state quite well the reason which all must concede would support such a decision and that reason appears in the statement of policy issued by the Dade County School Board:

"It is deemed by the Board that the best interest of the pupils and the orderly and efficient administration of the school system can best be preserved if the registration and attendance of pupils entering school commencing the current school term remains unchanged. Therefore, the Superintendent, principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and *conducted on a non-integrated basis.*"

For the plaintiffs in the Gilson case to have sought application for admission to a non-segregated school would have been fruitless in view of the announced decision by the Board that it intended to operate the school system on a non-integrated basis. It seems apparent that the plea by the Dade County School Board that the administrative remedy had not been exhausted was only for dilatory purposes since no relief could have been accorded plaintiffs under that law in view of the announced policy of that Board.

But compare the case at bar. The Board of Education of the Memphis City Schools had made public announcements of its desire to use the state assignment law as the vehicle for effecting desegregation. Specifically, the Board had advised respondents that the law would be applied on a racially non-discriminatory basis. Of prime importance, however, is the fact that the schools of Memphis were desegregated the first time the respondents gave petitioners that opportunity.

(d). *The Decision in the Sixth Circuit.*

With respect to this question in the case at bar, Judge Cecil stated:

> "We do not discuss exhaustion of remedies under the statute for the reason that we hold the Pupil-Assign-Law is not adequate as a plan for reorganizing the schools into a non-racial system. Kelly v. Board of Education of City of Nashville, 159 F. Supp. 272, 277, D.C.M.D. Tenn.; Gibson v. Board of Public Instruction of Dade County, Florida, 246 F. (2d) 913, C. A. 5." (Appendix, Page 62).

The Tennessee Pupil Assignment Law is for all practical purposes identical to the North Carolina and South Carolina laws considered by the Fourth Circuit in **Carson v. Board of Education,** supra, **Carson v. Warlick**, supra, **Holt v. Raleigh City Board,** supra, **Hood v. Board of Trustees of Sumter County School District** and **McCoy v. Greensborough City Board of Education,** supra. It is also identical to the placement law considered by the Eighth Circuit in **Dove v. Parham,** supra.

From a purely legal standpoint the remedy was found to be adequate in the Warlick case, supra. From the practical application of the law in Memphis it was found to be not only adequate but superbly suited to accomplish the transition. No more severe test could have been given to the law.

As has been stated many times, the Federal Courts should not be onerated with the burden of operating a public school system. Indeed it has been said they have no right to do so. It is the function of the Federal Courts to prevent the deprivation of Federal constitutional rights in the operation of state supported schools and this Court has heretofore fixed the guiding principle that no person shall be denied the right to attend the school of his choice on account of

race. That principle has furnished a solution in only a part of the field. As heretofore stated, confusion now exists in the means and methods that the several states will use to conform to Federal law. Such confusion has no place in this field. Either the Fourth and Eighth Circuits are correct, or the Fifth and Sixth Circuits are correct. This Court should give the states direction so that this uncertainty will be removed.

We respectfully urge that a solution of this second question in accordance with the wise and perceptive decision by the Circuit Court of Appeals for the Fourth Circuit in **Carson v. Warlick,** appearing on page 20 of this petition, will serve (1) to preserve the daily administration and operation of state and local public schools to those institutions to whom such rights and duties belong, the respective state and local Boards of Education and (2) to preserve to the Federal judiciary its proper function in the field of state and local school administration, which is to exercise Federal jurisdiction to protect constitutional rights of pupils and patrons of public schools when school officials and administrative remedies under state and local law have failed, refused or neglected to do so.

## CONCLUSION

The Board of Education of the Memphis City Schools does not desire to litigate. It much prefers to devote its time and efforts to educate. It has diverted a part of its efforts from its primary function because it deeply and sincerely feels that its method of meeting this problem conforms, at least for the present, to the mandate of this Court in the Brown cases. It believes that the method which it selected and has in operation is sanctioned by this

Court in the Shuttlesworth case. It knows that this method satisfies almost every single element of this community.

We most respectfully ask that this Court grant this petition, resolve the conflicts between the several Circuits and, upon a full consideration of the case, permit the continued desegregation of the Memphis schools under the plan that has proved so successful in this community.

Respectfully submitted,

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